# INDEX



## CITATIONS





743902—47——1

# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1320

FRED C. CAVE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 494–505) is reported in 159 F. 2d 464.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 17, 1947. (R. 505–506.) Rehearing was denied on March 7, 1947. (R. 521.) The time for filing a petition for a writ of certiorari was extended to May 5, 1947 (R. 534), and the petition for certiorari was filed May 3, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

## QUESTIONS PRESENTED

1. Whether an indictment alleging in separate counts that the petitioner wilfully attempted to evade and defeat taxes by the filing of false and fraudulent returns sufficiently charges offenses under Section 145 (b) of the Internal Revenue Code.

2. Whether the trial court properly instructed the jury.

3. Whether an attempt to evade and defeat a tax may be committed by the filing of a false and fraudulent return after the close of the taxable period but prior to the last date in the ensuing period provided by law for making the return and paying the tax owing.

4. Whether the admission of testimony of expert witnesses constituted prejudicial error.

## STATUTE INVOLVED

Internal Revenue Code, as amended:

> SEC. 145. PENALTIES.
>
> (a) *Failure To File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment,

or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure To Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1940 ed., Supp. V, Sec. 145.)

## STATEMENT

The petitioner was indicted in the Southern District of Iowa (R. 2) on charges, set forth in separate counts, that he wilfully attempted to defeat and evade a large part of the income tax

owing by him for each of the calendar years 1941 to 1944, inclusive. Each of the counts alleged that the petitioner, during the calendar year involved—

> did wilfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America * * * (1) by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Iowa a false and fraudulent income tax return * * * and (2) by concealing and attempting to conceal from the said Collector and any and all proper officers of the United States the true and correct gross and net incomes received by him * * *.

The petitioner was acquitted on counts one and two of the indictment, charging evasion for 1941 and 1942, and was convicted on counts three and four, covering 1943 and 1944. (R. 481.) Counts three and four set forth the amounts reported in the petitioner's returns as net income and tax owing and itemized the corrected gross income, deductions, net income and tax liability.[1] (R. 4–7.)

[1] The following table shows the amounts by which it was charged that the petitioner understated net income and tax:

| Year: | *Income per return* | *Income per indictment* | *Difference* |
|---|---|---|---|
| 1943 | $8,455.00 | $55,256.60 | $46,801.60 |
| 1944 | 788.04 | 69,959.62 | 69,171.58 |

| Year: | *Tax per return* | *Tax per indictment* | *Difference* |
|---|---|---|---|
| 1943 | $1,933.58 | $30,843.69 | $28,910.11 |
| 1944 | 8.64 | 43,392.22 | 43,383.58 |

By Instruction No. 13 (R. 477–478) the trial court charged that the evidence did not substantiate "that the defendant attempted to evade his income tax in the particulars set out in paragraphs numbered (2) in each of the counts of the indictment." The court withdrew those particulars from the jury's consideration and specifically reserved to it the determination of the question whether the petitioner had attempted to "evade and defeat his income taxes as charged in the particulars set out in paragraph numbered (1) in each count of the indictment," namely, whether the petitioner had "willfully attempted to defeat and evade a large part of his income tax * * * [in that he] filed * * * with the Collector of Internal Revenue a fraudulent income tax return * * * [knowing that] his net income * * * and the tax paid thereon was * * * in amounts in excess of that reported by him."

The falsity of the returns covering 1943 and 1944 was predicated on the petitioner's failure to report substantial earnings from the operation of slot machines located in club rooms of lodges of the Loyal Order of Moose in various cities in the State of Iowa. Representatives of the various lodges testified as to the arrangements made with the petitioner concerning operation of the slot machines and disposition of receipts. (R. 100–426.) A tax lawyer and accountant employed by the petitioner in connection with proceedings before the Treasury Department involving the re-

turns filed for 1941 to 1944, inclusive, testified concerning the petitioner's written statement under oath showing substantial increases in net worth during the period in question and net income derived from slot machines during 1943 and 1944 in the respective amount of $49,649.35 and $82,399.82. (R. 426-432.)

By Instructions Nos. 10 and 11, respectively (R. 475–476), identical except as to dates, the trial court charged concerning the elements of the offenses involved as to 1943 and 1944. Instruction No. 10 is here set forth in full:

> The material allegations of Count 3 of the indictment are:
>
> 1st, that on or about the 15th day of March, 1944, at Des Moines, Iowa, the defendant, Fred C. Cave, attempted to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1943.
>
> 2nd, that the defendant so attempted to defeat and evade said income tax by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Iowa, a false and fraudulent income tax return, substantially as charged in Count 3 of the indictment.
>
> 3rd, that he did this knowingly and willfully.
>
> If the Government has established each and all of these three foregoing material allegations from the evidence and beyond

a reasonable doubt, then you will be warranted in returning a verdict of guilty against the defendant as to Count 3 of the indictment. But, unless you so find that the Government has established each and all of the three foregoing material allegations of the indictment and from the evidence and beyond a reasonable doubt, then you must return a verdict of not guilty against the defendant on Count 3 of the indictment.

By Instruction No. 12 (R. 476) the trial court charged concerning the requisite of wilfulness, as follows:

> You are instructed that the defendant is not charged in this indictment with an intentional failure to make a return and pay a tax, he is charged with a much more serious offense of attempting to evade and defeat a large part of his income taxes by false and fraudulent statements contained in his income tax returns for the years in question.
>
> A fraudulent statement is a false statement made by a person knowing at the time it was made that it was false and made with the intent and purpose to deceive and mislead some person.
>
> So that one of the material allegations in each one of the counts of the indictment is that the defendant attempted to defeat and evade a large part of the income tax due from him, substantially as charged in

743902—47——2

> that Count by filing or causing to be filed with the Collector of Internal Revenue a fraudulent income tax return containing the statements substantially as set out in that count of the indictment, and that such statements when made were false and known by the defendant to be false, and were made with the intent on the part of the defendant to conceal from the said Collector of Internal Revenue defendant's true and correct gross and net income received by him during the calendar years substantially as set out in such count of the indictment; and in this manner attempted to defeat and evade that part of the tax which was not reported by him in his income tax return for the year in question.

By Instruction No. 14 (R. 478) the trial court further charged:

> You are instructed that the mere filing of a false or fraudulent return or the willful failure to pay an income tax due, or the willful failure to make a return, or to keep records, or to supply information are not of themselves sufficient to find the defendant guilty as charged in this indictment, but it is incumbent upon the government to go further and show that the defendant committed some wilful act, the likely effect of which would be to mislead or to conceal from the taxing officers the amount of income upon which the tax is levied and if the government fails to prove such

additional willful act, the defendant should be acquitted.

The Government called Paul J. Powers and George J. Zimmerman as expert witnesses to compute the income taxes of the petitioner for the years involved. Both witnesses were internal revenue agents of several years' experience. (R. 453, 465.) The witness Powers was called first. He testified on direct examination that his calculations were based upon his examination of Exhibits 1 to 44, inclusive. (R. 453). On cross-examination he stated that "to some extent at least" his calculations were based on additional information not before the Court. (R. 456–458.) The witness Zimmerman testified (R. 465–468) as to the amount of tax owing for each year on two separate bases, one of which was the petitioner's admissions as contained in Exhibit 35 (R. 426–432). The trial court charged in Instruction No. 15 (R. 478) that the jurors were "the sole judges of the credibility of the witnesses and of the weight to be given their testimony." In Instruction No. 16, the relevant portion of which is set forth below, the court charged with particular reference to the witnesses Powers and Zimmerman (R. 479):

> It is for you to say how much weight shall be given to such testimony in this case, * * *.
>
> Their opinions also were based upon an assumed state of facts, that is, a state of

facts which, it is claimed by the Government, have been shown by the evidence are true, so that it is important to determine from the evidence whether or not the facts so assumed are established by the evidence.

If you find the facts stated and assumed as the basis for the hypothetical questions and opinions of these experts are not established by the evidence then the opinions given by the experts based upon such assumed state of facts are entitled to no weight and you should attach no weight to such opinions.

It is for you to say whether such assumed state of facts, that is, the facts with reference to the amount of the income of the defendant and the amounts deducted therefrom, assumed to be true by the experts, have been proven and this you will do from all the evidence in the case bearing upon and tending to prove or disprove the facts so assumed; and if you find from the evidence in the case the facts assumed as a basis for such hypothetical questions are established by the evidence, then you should consider such expert testimony that is given in answer to such questions, in connection with all the other evidence in the case, and give it such weight as you may deem it fairly entitled to, weighing and considering it in the light of the rules given you elsewhere in these instructions for the weighing of testimony.

The petitioner did not testify and introduced no testimony. A motion in arrest of judgment on the ground that the indictment failed to charge an offense under Section 145 (b) of the Internal Revenue Code and a motion for new trial and exceptions to instructions were denied, and the petitioner was sentenced to a fine of $3,000 and three years' imprisonment on each of counts three and four, to run concurrently. (R. 489.) Upon appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment of conviction was affirmed. (R. 505.)

## ARGUMENT

### I

The petitioner's contention that an indictment charging only the wilful filing of a false and fraudulent return does not constitute a felony under Section 145 (b) of the Internal Revenue Code but at most a misdemeanor under Section 145 (a) or Section 3616 (a) of the Code results from a patently unwarranted limitation of the scope of Section 145 (b) and a misconception of this Court's ruling in *Spies* v. *United States,* 317 U. S. 492.

Section 145 (b) provides, *inter alia,* that "any person who willfully attempts *in any manner* to evade or defeat any tax * * * shall * * * be guilty of a felony * * *." (Italics supplied.) This language plainly indicates a Con-

gressional intention to cover all possible means of attempted evasion, including the wilful filing of a false and fraudulent return.[2] *United States* v. *Miro*, 60 F. 2d 58 (C. C. A. 2d). The broad scope of the statute in this respect was clarified beyond any doubt in *Spies* v. *United States, supra,* p. 499:

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner."
> * * *

The argument that application of the *Spies* case, *supra,* here required allegation and proof of wilful acts of commission in addition to the filing of false and fraudulent returns is wholly without merit. The *Spies* case does require, in order to support a Section 145 (b) prosecution, proof of some affirmative action in which the "tax-evasion motive plays any part" where it is charged that the attempted evasion was committed by means of a wilful *failure* to make a return and *failure* to

[2] In the great majority of tax prosecutions, the charge of wilfully attempted evasion has been predicated upon the filing of false and fraudulent returns, a basis repeated sanctioned by this Court. E. g., *United States* v. *Johnson*, 319 U. S. 503, rehearing denied, 320 U. S. 808; *Johnson* v. *United States*, 318 U. S. 189, rehearing denied, 318 U. S. 801; *United States* v. *Ragen*, 314 U. S. 513, rehearing denied, 315 U. S. 826; *United States* v. *Troy*, 293 U. S. 58.

pay a tax, derelictions which are misdemeanors under Section 145 (a). Clearly, however, this Court did not intend to rule out as a possible means of attempted evasion the inherently affirmative action involved in the filing of false and fraudulent returns.

## II

The Instructions complained of correctly stated the law applicable to the case and were internally consistent and devoid of any uncertainty. Instructions Nos. 10 and 11 (R. 475–476) properly charged the elements of the offenses involved. *Gleckman* v. *United States,* 80 F. 2d 394 (C. C. A. 8th), certiorari denied, 297 U. S. 709; *United States* v. *Miro,* 60 F. 2d 58 (C. C. A. 2d); *Guzik* v. *United States,* 54 F. 2d 618 (C. C. A. 7th), certiorari denied, 285 U. S. 545; *United States* v. *Schenck,* 126 F. 2d 702 (C. C. A. 2d); *Tinkoff* v. *United States,* 86 F. 2d 868 (C. C. A. 7th), certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715. In Instruction No. 12 (R. 476–477) the trial court elaborated upon one of the elements, wilfulness; in addition, it correctly charged that the offenses involved were not the "intentional failure to make a return and pay a tax" [misdemeanors under Section 145 (a)] but the "much more serious offense of attempting to evade and defeat * * * taxes by false and fraudulent statements contained in his income tax returns" [felonies under Section 145 (b)].

Instruction No. 13 merely removed from the jury's consideration whether the attempted evasion had been committed in each year by acts of concealment other than the filing of the false and fraudulent returns. It properly reserved to the jury the question whether the offenses had been committed by the filing of such returns.

Instruction No. 14 (R. 478) charged in substance that the jury could not convict if it merely found (a) that a factually false return had been filed for each year or (b) that the petitioner had failed to perform the statutory duties of paying a tax, keeping records and supplying information. As to (a), it is elementary that wilfulness is an additional requisite (*United States* v. *Skidmore*, 123 F. 2d 604 (C. C. A. 7th), certiorari denied, 315 U. S. 800); as to (b), it would seem sufficient to observe that it correctly states the rule announced in *Spies* v. *United States, supra.*

## III

The petitioner contends that the fourth count does not state an offense under Section 145 (b) because the return for that year was filed on January 15, 1945. The argument is fallacious. Section 53 (a) (1) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 53) permits a taxpayer who is on a calendar year basis to file his return "on or *before* the 15th day of March following the close of the calendar year." [Italics supplied.] Although Section 56 (a) of the Code (26 U. S. C.

1940 ed., Sec. 56) requires that the tax "shall be paid on the fifteenth day of March following the close of the calendar year," the tax nevertheless "may be paid * * * prior to the date prescribed for its payment." [Italics supplied.] Section 56 (d), Internal Revenue Code. The offense charged in the fourth count was complete when the petitioner wilfully filed the false return. *Guzik* v. *United States,* 54 F. 2d 618, 619 (C. C. A. 7th), certiorari denied, 285 U. S. 545; *Bowles* v. *United States,* 73 F. 2d 772, 774 (C. C. A. 4th), certiorari denied, 294 U. S. 710.

## IV

The criticism of the expert testimony is without merit. By Instruction No. 16 (R. 478–479) the trial court properly subjected to the jury's determination the correctness and credibility of all the materials underlying the experts' testimony and left it free to exercise its untrammeled judgment upon their worth and weight. *United States* v. *Johnson,* 319 U. S. 503, 519, rehearing denied, 320 U. S. 808. It thus laid bare for the jury's acceptance or rejection, in whole or in part, the basis for the calculations of the witness Powers, made from examination of all of the exhibits in evidence and only "to some extent" upon reliance of the additional information concerning which the petitioner felt aggrieved. Assuming that the jury chose to reject all of Powers'

testimony, the judgment of conviction nevertheless could rest either on the admissions of tax liability reflected in Exhibit 35 or upon the witness Zimmerman's independent computation therefrom.

### CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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